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14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA

16 MAGIC LEAP, INC.,

17 Plaintiff,

18 v.

19 CHI XU, an individual; HANGZHOU  
20 TAIRUO TECHNOLOGY CO., LTD., d/b/a  
21 NREAL,

22 Defendants.

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MAGIC LEAP, INC.

Case No. 5:19-cv-03445-LHK

**JOINT STATEMENT RE THE  
PARTIES' REQUEST FOR ENTRY OF  
A PROTECTIVE ORDER**

Courtroom: 6  
Magistrate Judge: Hon. Susan van Keulen

1     **I.     NATURE OF THE CASE AND PRESENT DISCOVERY DISPUTE**

2             On June 17, 2019, Plaintiff Magic Leap, Inc. (“Magic Leap”) filed its complaint against  
3 Defendants Chi Xu (“Xu”) and Hangzhou Tairuo Technology Co., Ltd., d/b/a Nreal (“Nreal”).  
4 Magic Leap alleges that Xu, a former Magic Leap employee, violated the terms of a “Proprietary  
5 Information and Inventions Agreement” (“PIIA”) he signed while employed at Magic Leap. Xu  
6 founded Nreal after leaving Magic Leap. Magic Leap alleges that Xu’s formation of Nreal and  
7 Nreal’s product development reflects “improper use, disclosure and knowledge of Magic Leap’s  
8 Confidential Information (including the Confidential Designs) protected under the PIAA.”  
9 Complaint ¶ 23. Magic Leap’s Complaint brings four claims against Xu and Nreal: (1) Xu breached  
10 the “Confidential Information” provision of the PIIA, (2) Nreal interfered with Xu’s obligations  
11 not to misuse Magic Leap’s Confidential Information under the PIIA, (3) Xu and Nreal committed  
12 constructive fraud against Magic Leap, and (4) Xu and Nreal violated California’s Unfair  
13 Competition statute. On December 16, 2019, Xu and Nreal filed a motion to dismiss the complaint  
14 in its entirety. That motion is fully briefed and pending before the Court.

15             On December 30, 2019, the Court ordered that “discovery, jurisdictional or otherwise, [was]  
16 not ... stayed.” Magic Leap has issued two sets of discovery requests. The Parties agree that entry  
17 of a Protective Order is necessary. The Parties have largely worked through all of their disputes  
18 over the terms of a Protective Order. However, despite their good faith meet and confer efforts,  
19 the Parties are unable to agree on one issue: whether Designated In-House Counsel of the Parties  
20 should have access to materials designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES  
21 ONLY” (“AEO Materials”) under the Protective Order.

22             Defendants’ position is that In-House Counsel should not have access to such highly  
23 confidential information (*see* Xu and Nreal’s [Proposed] Protective Order, attached as **Exhibit A**,  
24 and redline showing changes from the Model Order, attached as **Exhibit B**). Plaintiff’s position is  
25 that one In-House Counsel should have access to such highly confidential information (*see* Magic  
26 Leap’s [Proposed] Protective Order, attached as **Exhibit C**, and redline showing changes from the  
27 Model Order, attached as **Exhibit D**). The Parties otherwise agree on the scope and terms of a  
28 Protective Order, and aside from the dispute over In-House Counsel access to AEO Materials, their

1 proposed orders are otherwise the same. The Parties respectfully request the Court resolve this  
2 dispute and enter a Protective Order. The Parties' respective positions on this issue are set forth  
3 below.

4 **II. THE PARTIES' DISPUTE REGARDING THE SCOPE OF A PROTECTIVE**  
5 **ORDER**

6 **A. Summary of Defendants Xu and Nreal's Position**

7 Defendants Xu and Nreal's proposed Protective Order, attached as Exhibit A, would  
8 prohibit both sides' In-House Counsel from accessing AEO Materials. These materials, by  
9 definition, are "extremely sensitive" and "disclosure ... to another Party or Non-Party would create  
10 a substantial risk of serious harm." Ex. A ¶¶ 2.8. Here, restricting access is necessary to protect  
11 Defendants' most sensitive technical and business information to a self-described competitor. *See*  
12 *Complaint* (ECF No. 1) ¶¶ 18, 32–34.

13 In the Northern District, there is no presumption that in-house counsel get access to AEO  
14 Materials. The Model Protective Order gives access to such counsel only "where deemed  
15 appropriate in case-specific circumstances." **Exhibit E** (Model Protective Order) ¶ 7.3(b). The rule  
16 reflects that allowing in-house attorneys access to highly confidential and sensitive information of  
17 a litigation adversary increases the risks of inadvertent disclosure, particularly where the in-house  
18 attorneys may be involved in competitive decision-making. *Pinterest, Inc. v. Pintrips, Inc.*, No.  
19 13-CV-04608-RS (KAW), 2014 WL 5364263, at \*3 (N.D. Cal. Oct. 21, 2014) (restricting in-house  
20 counsel's access to AEO materials); *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470  
21 (9th Cir. 1992) (citing *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984)).

22 Here, there are no circumstances that warrant a departure from the default rule. Magic Leap  
23 describes itself as a competitor of Nreal. Moreover, in the discovery served to date, Magic Leap  
24 seeks the most sensitive information about Nreal and its products, including information and  
25 documents about (1) Nreal's business plans for all products, (2) exemplar and all prototypes of  
26 Nreal's current product, (3) Nreal's current and contemplated development of any product in the  
27 broad field of Spatial Computing, including product specifications, and (4) Nreal's product  
28 financials. These requests go far beyond the issues in this case and seek to discover Nreal trade

1 secrets. Permitting access—even limited access—to Magic Leap’s in-house legal team is especially  
2 problematic given the intimate knowledge they have about all aspects of Magic Leap’s business,  
3 including its road map. See **Exhibit F** (Profile of Ana Lang, [https://profilemagazine.com/2018/ana-](https://profilemagazine.com/2018/ana-lang-magic-leap/)  
4 [lang-magic-leap/](https://profilemagazine.com/2018/ana-lang-magic-leap/)) (“[Magic Leap in-house attorney Ana] Lang says everyone in the legal  
5 department must have an almost innate understanding of Magic Leap’s technology and product  
6 road map, like its devices, the apps and content available, key third-party business relationships,  
7 and overall specifications for the product’s optimal use.”). Given the nature of materials Magic  
8 Leap has already requested in discovery and the type of information that may come up in the  
9 ordinary course of business, there is a clear risk of inadvertent disclosure because of the difficulty  
10 “for the human mind to compartmentalize and selectively suppress information once learned, no  
11 matter how well-intentioned the effort may be to do so.” *In re Deutsche Bank Trust Co. Americas*,  
12 605 F.3d 1373, 1378 (Fed.Cir.2010).

13 Moreover, restricting In-House Counsel access to AEO Materials will not prejudice any  
14 party. Courts in the Northern District recognize that relying on outside counsel, especially where  
15 counsel has been involved since the beginning of a dispute, is an acceptable alternative to opening  
16 a party’s most guarded secrets to an adversary. See *Pinterest*, 2014 WL 5364263 at \*3 (harm to  
17 plaintiff for restricting access to AEO materials was “non-existent”); *Brown Bag Software*, 960  
18 F.2d at 1471 (no prejudice where outside counsel had sufficient time and resources to review  
19 confidential information and was presumably competent to evaluate the information); *Intel Corp.*  
20 *v. VIA Tech, Inc.*, 198 F.R.D. 525, 529 (N.D.Cal.2000) (“Requiring a party to rely on its competent  
21 outside counsel does not create an undue or unnecessary burden.”). With experienced outside  
22 counsel defending its interests, In-House Counsel access to AEO Materials is unnecessary.

23 **B. Summary of Plaintiff Magic Leap’s Position**

24 As the parties “seeking an order that would limit the disclosure of discovery material to  
25 certain persons,” the burden is on *Defendants* to “show[] good cause” that such disclosure should  
26 be limited. *Newmark Realty Capital, Inc. v. BGC Partners, Inc.*, No. 16CV01702BLFSVK, 2017  
27 WL 2591842, at \*1 (N.D. Cal. June 15, 2017). Here, Defendants cannot meet their burden. While  
28 Defendants attempt to read into the Model Order language a stringent constraint on In-House

1 Counsel access to AEO Material, the Model Order clearly contemplates such access and sets forth  
2 the standard for allowing it. Indeed, courts routinely approve provisions identical in substance to  
3 what Plaintiff proposes “because all attorneys are officers of the court, ‘the general rule is that  
4 attorneys operating under a protective order will properly handle confidential information,’”  
5 regardless of whether they are in-house or outside counsel. *Alza Corp. v. Impax Labs., Inc.*, No.  
6 C-03-4032-VRW, 2004 WL 7339748, at \*2 (N.D. Cal. June 21, 2004).

7 In an attempt to avoid this fundamental principle, Defendants conflate Magic Leap’s In-  
8 House Counsel’s *knowledge* of Magic Leap’s products and technology, with their *involvement* in  
9 competitive decision-making. See Exhibit F ([https://profilemagazine.com/2018/ana-lang-magic-](https://profilemagazine.com/2018/ana-lang-magic-leap/)  
10 [leap/](https://profilemagazine.com/2018/ana-lang-magic-leap/)). But the two are plainly distinct and Defendants cannot possibly suggest that the fact that  
11 Magic Leap’s In-House Counsel are “innate[ly]” familiar with the products of their employer  
12 should disqualify them from being able to review AEO Materials. In order to alleviate Defendants’  
13 concerns, and in accordance with the Model Order, Magic Leap’s proposal limits disclosure of  
14 AEO Materials to a single in-house attorney “who has no involvement in competitive decision-  
15 making.” See Exhibit E (Model Order) ¶ 7.3. Nreal would have the same right. As numerous  
16 courts in this district have held, this limitation sufficiently protects against the competitive concerns  
17 raised by Defendants. See, e.g., *Newmark*, 2017 WL at \*1 (the “safeguards of Paragraph 7.3 are  
18 designed to address the[se] concerns”); *Aristocrat Techs. v. Int’l Game Tech.*, No. C 06-3717 MJJ  
19 (JL), 2007 WL 9747649, at \*5 (N.D. Cal. Feb. 1, 2007) (granting access to in-house attorney who  
20 was not involved in competitive decision-making). The cases Defendants cite do not warrant a  
21 different outcome as each involved a court’s rejection of a *specific* in-house attorney who was  
22 involved in competitive decision-making, rather than a wholesale bar to all In-House Counsel  
23 access. See, e.g., *Pinterest, Inc. v. Pintrips, Inc.*, No. 13-CV-04608-RS (KAW), 2014 WL 5364263,  
24 at \*3 (N.D. Cal. Oct. 21, 2014) (analyzing whether particular in-house attorney was involved in  
25 competitive decision-making); *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th  
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1 Cir. 1992) (same); *Intel Corp. v. VIA Tech, Inc.*, 198 F.R.D. 525, 529 (N.D. Cal. 2000) (same).<sup>1</sup>

2 Access to AEO Materials is important to Magic Leap's prosecution of its case. This case  
3 centers around Defendants' access to, and improper use of, Magic Leap's Confidential Information  
4 relating to its product designs and plans. (See Complaint ¶ 17.) As such, Defendants' documents,  
5 in particular, documents relating to Nreal's formation, product design, and development efforts, are  
6 essential to a full assessment of the case. Magic Leap anticipates that Defendants will designate  
7 nearly all of their product and internal business information as AEO Materials. As such, Magic  
8 Leap seeks access to AEO Materials for a single in-house attorney. Access to AEO Materials will  
9 enable the in-house attorney to meaningfully assist outside counsel in assessing use of Magic  
10 Leap's Confidential Information, developing the facts and legal positions in the litigation, and  
11 assessing the possibility of settlement. These are routine functions of In-House and there is no  
12 good cause basis to deviate from the norm in this case.

13 Dated: April 29, 2020

14 ORRICK, HERRINGTON & SUTCLIFFE LLP

15  
16 By: /s/ Jared Bobrow  
17 Jared Bobrow  
18 Attorneys for Defendants  
19 CHI XU and HANGZHOU TAIRUO  
20 TECHNOLOGY CO., LTD., d/b/a NREAL

21 Dated: April 29, 2020

22 COOLEY LLP

23  
24 By: /s/ Mark F. Lambert  
25 Mark F. Lambert  
26 Attorneys for Plaintiff  
MAGIC LEAP, INC.

27 <sup>1</sup> In *In re Deutsche Bank Trust Co. Americas*, 605 F.3d 1373, 1378 (Fed. Cir.2010), the court  
28 assessed the appropriateness of a patent prosecution bar and remanded for further analysis of  
whether it was appropriate in that case. As such, it appears entirely inapplicable.

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**ATTESTATION**

I attest that, under Civil Local Rule 5-1(i)(3), I have obtained concurrence in the filing of  
this document from all Signatories.

Dated: April 29, 2020

ORRICK, HERRINGTON & SUTCLIFFE LLP

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